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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARIE A. HARTWELL, Plaintiff and Appellant, v. CHILDREN'S HOSPITAL SAN DIEGO, Defendant and Respondent.	D051987 (Super. Ct. No. GIC864037)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia Y. Cowett, Judge. Dismissed.

Plaintiff Marie A. Hartwell appeals a summary judgment entered in her wrongful employment termination action against defendant Children's Hospital San Diego (CHSD). On appeal, she contends the trial court erred by granting CHSD's motion for summary judgment because there are triable issues of material fact on her cause of action for wrongful termination in violation of public policy. CHSD filed a motion to dismiss

Hartwell's appeal on the ground her notice of appeal was untimely filed. Because we grant CHSD's motion to dismiss, we do not consider the merits of the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993 Hartwell became employed by CHSD. On November 17, 2005, she submitted a letter of resignation to Beverly Self, her supervisor, and stated she was willing to stay until January 1, 2006, if needed to train her successor. On December 1, 2005, Hartwell sent an e-mail to CHSD stating she wanted to rescind her resignation. On December 2, Hartwell's physician excused her from work through December 9. Although Hartwell remained absent from work after December 9, she did not provide CHSD with any medical documentation or paperwork required for leave under the federal Family and Medical Leave Act (FMLA) (29 U.S.C. § 2614) or California Family Rights Act (CFRA) (Gov. Code, § 12945.2). On December 28, Self sent a letter to Hartwell explaining that she had accepted her resignation and was unable to consider her request to withdraw it. Self informed her that her final day as a CHSD employee would be December 31.

In April 2006 Hartwell filed the instant action against CHSD. In March 2007 she filed her operative second amended complaint alleging one cause of action for wrongful termination of employment in violation of public policy. On March 26, CHSD filed a motion for summary judgment. Hartwell opposed the motion. On May 15, 2007, the trial court issued an order granting CHSD's motion for summary judgment. On June 15,

the trial court entered judgment for CHSD (Judgment), which incorporated by reference the court's May 15 order.

On November 5 Hartwell filed a notice of appeal. On December 7, CHSD filed a motion to dismiss the appeal as untimely filed. On December 26, we issued an order stating we would consider the motion to dismiss with the appeal.

DISCUSSION

I

Motion to Dismiss

CHSD asserts that because Hartwell's notice of appeal was untimely filed, its motion to dismiss should be granted.

A

On December 7 CHSD filed a motion to dismiss the appeal. In support of its motion, CHSD submitted a memorandum of points and authorities and the declaration of Rita R. Kanno, one of CHSD's attorneys. CHSD stated that on June 21, 2007, it served Hartwell by mail with a file-stamped copy of the Judgment, along with a proof of service. CHSD noted Hartwell did not file her notice of appeal until after the last day to file a timely notice of appeal. Pursuant to California Rules of Court, rule 8.104(a)(2),[1] Hartwell had 60 days after CHSD's June 21 service of the file-stamped copy of the Judgment within which to file a timely notice of appeal (i.e., on or before August 20). Therefore, CHSD argued Hartwell's appeal must be dismissed as untimely filed.

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1 All rule references are to the California Rules of Court.

In support of CHSD's motion to dismiss, Kanno declared, under penalty of perjury, that she had personal knowledge of the facts attested to in her declaration and those facts were true and correct. Kanno stated: "[T]he judgment sent by CHSD included a proof of service. A true and correct copy of the file-stamped copy of the trial court's June 15, 2007[,] judgment is attached hereto as Exhibit 'C.' " Exhibit C attached to Kanno's declaration consists of a file-stamped copy of the Judgment (which incorporated by reference the trial court's May 15 order), together with a proof of service by mail. The proof of service was signed by Kathie Richmond on June 21, 2007, and under penalty of perjury she declared that she was familiar with her business's practice for collection and processing of correspondence for mailing and that "the correspondence shall be deposited with the United States Postal Service *this same day* in the ordinary course of business." (Italics added.) Richmond's proof of service further declared: "I caused to be served the following document(s): [¶] 1. Judgment by the Court on [CHSD's] Motion for [S]ummary Judgment by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows: [¶] Attorneys for [Hartwell] [listing name and mailing address of Hartwell's attorney]."

On December 18, Hartwell filed her opposition to CHSD's motion to dismiss. She submitted a memorandum of points and authorities and a declaration of Debra L. Barker, a legal assistant for Hartwell's attorneys. Hartwell denied receiving by mail on June 21, 2007, a copy of the Judgment from CHSD. Hartwell admitted receiving a conformed copy of the Judgment on July 25 *by e-mail* from Kathie Chapa, a legal assistant for

CHSD's attorneys. Hartwell asserted that it was not until a November 14 e-mail from Chapa that she received a copy of the proof of service showing CHSD's service by mail of the Judgment. Hartwell questions the validity of that proof of service, asserting it is "highly suspect," and therefore the 180-day period for filing her notice of appeal applies. She argued her November 5 notice of appeal was timely filed within 180 days after entry of the Judgment on June 15.

In support of Hartwell's opposition to the motion to dismiss, Barker declared, under penalty of perjury, that on July 25 she received by e-mail the Judgment with no proof of service attached. Barker stated: "This office was never served **by mail** with a copy of the Judgment, only by e[-]mail on July 25, 2007[,] and **without a proof of service**." Barker further stated that on November 14 Chapa sent her an e-mail attaching the Judgment and proof of service, which Barker asserted "was the first time this office ever saw or was served with the Judgment and Proof of Service." Exhibit 3 attached to and made a part of Barker's declaration consists of the e-mails and attachments referenced in her declaration (e.g., the file-stamped copy of the Judgment and Richmond's June 21 proof of service by mail). Barker also stated that when she and Rod Toothacre, Hartwell's attorney, went to the trial court, they did not find any proof of service in the court's files. Exhibit 3 to Barker's declaration includes a file-stamped copy of the Judgment (which incorporated by reference the trial court's May 15 order), along with Richmond's proof of service by mail, the same documents attached to Kanno's declaration as Exhibit C discussed above.

On December 20, CHSD filed a reply to Hartwell's opposition to its motion to dismiss. Noting Hartwell alleged she never received a copy of the Judgment by mail, CHSD stated that Exhibit C to Kanno's declaration was "a copy of the file-stamped judgment served on Hartwell, accompanied by a proof of service." CHSD argued a proof of service that complies with the requirements of Code of Civil Procedure section 1013, subdivision (a) (hereafter § 1013, subd. (a)), raises a presumption the mailing was received by the addressee. Also, the sender does not have the burden to show the addressee actually received the document. CHSD argued *Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357 (*Sharp*) was apposite to this case, and therefore Hartwell's denial that she received the copy of the Judgment did not disprove CHSD served her by mail with a file-stamped copy of the Judgment, along with a proof of service. Because Hartwell's notice of appeal was filed more than 60 days after CHSD served her by mail with the file-stamped copy of the Judgment, accompanied by a proof of service, CHSD argued her appeal was untimely and must be dismissed.

B

Rule 8.104(a) provides the time period within which a notice of appeal must be filed:

> "[A] notice of appeal must be filed on or before the earliest of:
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> "(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed;

> "(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
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> "(3) 180 days after entry of judgment." (Italics added.)

"The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal. [Citation.]" (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) "Compliance with the time for filing a notice of appeal is mandatory and jurisdictional. [Citation.] If a notice of appeal is not timely, the appellate court must dismiss the appeal. [Citation.]" (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582.)

C

Citing Richmond's proof of service (attached to the declarations of both Kanno and Barker), CHSD asserts the 60-day period under rule 8.104(a)(2) applies to bar Hartwell's appeal as untimely filed. Richmond stated in her proof of service, under penalty of perjury, that a copy of the Judgment was served by mail on Hartwell's attorney on June 21, 2007. Furthermore, Kanno stated in her declaration, under penalty of perjury: "[T]he judgment sent by CHSD included a proof of service. A true and correct copy of the file-stamped copy of the trial court's June 15, 2007[,] judgment is attached hereto as Exhibit 'C.' " The copy of the Judgment is stamped as "filed" with the trial court on June 15, 2007, thereby meeting the requirement of service of a "file-stamped" copy of the Judgment. (Rule 8.104(a)(2).) Based on Kanno's declaration and

Richmond's proof of service, CHSD asserts it completed service on Hartwell by mailing on June 21, 2007, a file-stamped copy of the Judgment, accompanied by a proof of service, to her attorney, thereby satisfying rule 8.104(a)(2)'s requirements and commencing its applicable 60-day appeal period on June 21.

Section 1013, subdivision (a), provides in part: "In case of service by mail, the notice or other paper shall be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service . . . . The *service is complete at the time of the deposit* . . . ." (Italics added.) Therefore, "the sender does not have the burden of showing the notice was actually received by the addressee [for service by mail to be completed]. [Citation.]" (*Sharp, supra*, 8 Cal.App.4th at p. 360.) On the contrary, the addressee, Hartwell's attorney, "incurred 'the risk of the failure of the mail.' [Citation.]" (*Silver v. McNamee* (1999) 69 Cal.App.4th 269, 280, quoting *Caldwell v. Geldreich* (1955) 137 Cal.App.2d 78, 81; see also Evidence Code section 641 ["A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."].)

As noted above, Hartwell's opposition to the motion to dismiss is based primarily on the claim that she (or her attorney) *did not actually receive* a file-stamped copy of the Judgment or an accompanying proof of service until July 25, 2007, or later, and then received those documents only by e-mail, not regular mail. However, it is the date of *service* of the file-stamped copy of the judgment, accompanied by a proof of service, that triggers the 60-day appeal period, *not* the addressee's *actual receipt* of those documents.

(Rule 8.104(a)(2); *Sharp, supra*, 8 Cal.App.4th at p. 360.) Therefore, Hartwell's claim that she (or her attorney as the addressee) did not actually receive those documents is insufficient to show CHSD did not serve by mail the file-stamped copy of the Judgment on June 21, 2007, as stated in Richmond's proof of service signed under penalty of perjury. Furthermore, to the extent Hartwell claims Richmond's proof of service did not accompany the file-stamped copy of the Judgment that purportedly was served on her by mail, that claim is unsupported by any evidence and is therefore mere speculation. Because Hartwell claims she did not actually receive either of those documents by mail, she has no basis on which to know whether the proof of service accompanied the file-stamped copy of the Judgment served by mail on her attorney.

Kanno's declaration and Richmond's proof of service show CHSD completed service on Hartwell by mailing on June 21, 2007, a file-stamped copy of the Judgment, accompanied by a proof of service, to her attorney. (Rule 8.104(a)(2); § 1013, subd. (a); *Sharp, supra*, 8 Cal.App.4th at p. 360.) Accordingly, rule 8.104(a)(2)'s 60-day appeal period for filing a notice of appeal began to run on June 21. Because Hartwell did not file her notice of appeal until November 5 (i.e., about 137 days later), her notice of appeal was untimely filed and we lack jurisdiction to consider her appeal.[2]

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2 Hartwell argues CHSD's service pursuant to rule 8.104(a)(2) was either inadequate or unproven because it did not file Richmond's June 21 proof of service with the trial court. Rule 8.104(a)(2) does not contain any requirement that a proof of service (or the file-stamped copy of the Judgment) be filed with the trial court for service to be completed. (*Sharp, supra*, 8 Cal.App.4th at pp. 360-361; *Casado v. Sedgwick, Detert, Moran & Arnold* (1994) 22 Cal.App.4th 1284, 1286; cf. *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1279-1280.) Rule 1.21(b) (requiring filing of documents that are

DISPOSITION

The appeal is dismissed. The parties are to bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.

required to be "serve[d] and file[d]"), cited by Hartwell, is inapplicable and does not show otherwise. Although Hartwell does not raise the issue, because she concedes she had actual knowledge of entry of the Judgment by no later than July 25, 2007 (i.e., within the 60-day appeal period), our application of rule 8.104(a)(2) in the circumstances of this case to dismiss Hartwell's appeal "does not offend due process." (*Sharp*, at p. 361.)